



Macharia v Muchoki(Suing as the legal representatives of the estate of Kamau Kori TERRACE HOTEL LIMITED) & 2 others (Civil Appeal (Application) E298 of 2023) [2023] KECA 907 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 907 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E298 OF 2023
HM OKWENGU, JA
JULY 24, 2023**

BETWEEN

TITUS THUO MACHARIA APPLICANT

AND

PATRICK MACHARIA MUCHOKI 1ST RESPONDENT

IRENE WANJIKU MUCHOKI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KAMAU KORI TERRACE HOTEL LIMITE) 2ND RESPONDENT

TERRACE HOTEL LIMITED 3RD RESPONDENT

(Being an application for leave to appeal out of time against the consent judgment of the High Court (Mwita, J) entered on 5th December 2022)

RULING

1. By a notice of motion dated 21st March 2023, the applicant Titus Thuo Macharia, suing as the legal representative of the Estate of Alice Muthoni Gichuhi, has moved this Court for orders as follows:
 - i. That the Court be pleased to grant the applicant leave to file his appeal out of time.
 - ii. That the Court be pleased to grant stay of execution of orders issued by Hon E C Mwita.
 - iii. That the Court be pleased to grant the applicant 21 days to file its file out of time upon being granted leave to file its appeal.
 - iv. That the costs of the application be in the cause.



2. The applicant has not stated the provisions under which his motion is anchored. However, in a supporting affidavit sworn by the applicant and another affidavit sworn by the applicant's advocate, Moses Muiruri, it is deponed that the applicant is aggrieved by a consent judgment that was entered on December 5, 2022, before Mwita, J which consent he was not a party to even though he is a party in the proceedings. His efforts to obtain a copy of the judgment have not been successful. He explains that no consent was filed in court except for the oral communication made in court to which he objected.
3. The applicant has filed written submissions in which he urges the Court to exercise its discretion in his favour. The applicant relies on *Thuita Mwangi vs Kenya Airways Limited* [2003] eKLR, and the Supreme Court decision in *Mombasa County Government vs Kenya Ferry Services & Anor* [2019] eKLR. He contends that the application was filed two months after the lapse of 30 days provided under section 79(g) of the *Civil Procedure Act*, and that the delay was not inordinate delay. He explains that the delay was caused by difficulty in obtaining copies of the judgment from the Court. He argues that his intended appeal is arguable and therefore urges the Court to grant the orders sought.
4. The respondents were all duly served with the hearing notice on June 1, 2022 through email where they were informed that the hearing of the motion would proceed by way of written submissions and they were invited to file written submissions. Nevertheless, none of the respondents filed any reply to the application, nor have they filed any submissions.
5. Although the applicant has not set out the provisions under which his motion is anchored, it is apparent that he has two main prayers. First is an application to file an appeal out of time. Such an application would lie under Rule 4 of the *Court of Appeal Rules* 2022 under which I have powers as a single Judge to extend time. The applicant is also seeking for stay of execution of orders issued by the High Court. Such an application would lie under Rule 5(2)(b) of the *Court of Appeal Rules* which as read with Rule 55(2)(b) of the *Court of Appeal Rules*, can only be heard by a full bench. That is to say that the applicant's motion is defective as it is an omnibus motion.
6. But even if I was to consider the applicant's prayer for extension of time, the Court's discretion to extend time under Rule 4 of the Court of Appeal Rules can only be activated where the applicant has laid a proper basis by demonstrating that there was no inordinate delay and has explained to the satisfaction of the Court the reason for the delay. (See *Leo Musila Mutiso vs Rose Hellen Wangari Mwangi* [1999] 2EA 231; *Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR; *Karny Zabarya & Another vs Shalom Levi* C Appl No. 80 of 2018, [2018] eKLR; *Nicholas Kiptoo Arap Korir vs Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR).
7. The decision subject of the intended appeal was delivered on December 5, 2022, while the motion herein was filed on March 21, 2023, about 3 months later. The applicant filed a notice of appeal dated March 21, 2023, on the same date of the motion. The applicant attributes the delay in taking the necessary action on the lack of a certified copy of the judgment, which he avers he is yet to be provided with. The applicant has further attached a copy of a letter requesting for certified copy of judgement, which letter is dated January 30, 2023.
8. Although the impugned decision was entered on December 5, 2022, the next earliest action taken was that of January 30, 2023, when the applicant applied for a certified copy of the decision. This was about 56 days later. No explanation has been given for this kind of delay. Further and in addition to that delayed timeline, the applicant only filed a notice of Appeal on March 21, 2023 and filed the present motion on the same day. This was another 50 days later. It seems that the applicant's actions were an afterthought as there is no good reason given for the delay in filing the notice of appeal or the application for extension of time.



9. The applicant has failed to lay a basis for the exercise of the Court's discretion to extend time. The delay on the part of the applicant in failing to file the appeal is inordinately long without appropriate reason. For this reason, the application has no merit in regard to the prayer for extension of time.
10. Accordingly, the application dated March 21, 2023 not only lacks merit, but is struck out for being incompetent. The respondents not having defended the motion, I make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

